

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

FINE EARTH LANDSCAPE, INC. and
JOEL C. HAFNER AND STEVE CHAPMAN
Respondents

Case No.: I-00-10694

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Official Code §§ 2-1801.01 *et seq.*), and Title 21, Chapter 5 of the District of Columbia Municipal Regulations (“DCMR”). By Notice of Infraction served October 3, 2001, the Government charged Respondents Fine Earth Landscape, Inc. (“Fine Earth”), Joel C. Hafner and Steve Champlin with a violation of 21 DCMR 543.3 for allegedly failing to provide an erosion and sediment control plan; 21 DCMR 539.4 for allegedly failing to place adequate erosion control measures before and during exposure; 21 DCMR 539.3 for allegedly failing to protect all cut and fill slopes against storm water runoff; 21 DCMR 541.2 for allegedly failing to place excavated material on uphill side of trenches; and 21 DCMR 505.3 for allegedly failing to notify the Department of Health upon timely completion of the land disturbing activity. The Notice of Infraction alleged that the violations occurred on September 11, 2001 at 4800 Dexter Street, N.W. (the “Work Site”), and sought a fine of \$100 for each violation, for a total fine sought of \$500.

Respondents entered timely answers and pleas denying all the charges set forth in the Notice of Infraction, and an evidentiary hearing was held on January 4, 2002. Peter Nwangwu, the charging inspector in the case (the “Inspector”), appeared on behalf of the Government. Respondent Joel Hafner, vice president of Respondent Fine Earth, appeared on behalf of himself and Fine Earth.¹

Based upon the entire record in this matter, I now make the following findings of fact and conclusions of law:

II. Findings of Fact

1. On September 11, 2001, the Inspector visited the Work Site and observed construction activity, including a land “cut” which consists of the excavation and piling of dirt to form a trench. *See* Petitioner’s Exhibit (“PX”) 100. Respondents were constructing a 20-foot retaining wall at the rear of the Work Site, and had not completed work as of September 11, 2001. PX 103. The Inspector observed exposed dirt piles on the side of the trench, and those piles had been established for less than four days. PX 100. The dirt from these piles was used to buttress the retaining wall. Although the Inspector did not observe any erosion and sedimentation control in place at the Work Site, a silt fence had been installed around the Work Site as of September 11, 2001 and remained there until sometime in October, 2001. *See* Respondent’s Exhibits (“RX”) 200, 202 and 203.

¹ At the hearing it was determined that Respondent Steve Chapman, the apparent owner of the Work Site, was not served with notice of these proceedings. As there is no evidence in the record that either Fine Earth or Mr. Hafner had been designated to act as Mr. Chapman’s agents for purpose of receiving service of process, Mr. Chapman shall be dismissed from these proceedings for lack of proper service. *See* D.C. Official Code § 2-1802.05.

2. I cannot determine from this record whether, for purposes of 21 DCMR 541.2, the dirt piles were stored on the uphill or downhill side of the trench. While the Inspector testified that he observed erodible material on the downhill side of the trench at the Work Site, Mr. Hafner testified that any such material was stored on the uphill side on the trench. Mr. Hafner also testified that it would have been virtually impossible to store material on the downhill side of the trench as that area was a different property. The photographic evidence offered by the Government is inconclusive as to this issue. Accordingly, the Government has not met its burden of proof by a preponderance of the evidence that Respondents stored erodible material on the downhill side of the trench.

3. On September 11, 2001, the Inspector questioned three or four unidentified workers about producing a permit and an erosion and sediment control plan. Those workers were unable to produce this information. The Inspector left a telephone message with Mr. Hafner later that day. Mr. Hafner agreed to meet with the Inspector the next day in order to show the Inspector the requested materials.

4. On September 12, 2001, the Inspector met with Mr. Hafner and requested an erosion and sediment control plan. In response, Mr. Hafner produced a topographic survey of the Work Site. PX 103. Attached to the topographic survey was an erosion and sediment control plan detail sheet, with a stamp from the Watershed Protection Division indicating that the erosion and sedimentation control review fees had been paid. PX 103. Although Respondents provided no

other erosion and sediment control plan as part of the permit process, a permit had been issued for the Work Site.²

5. The Inspector then advised Mr. Hafner that the topographic survey and detail sheet did not constitute an erosion and sediment control plan. PX-101 and 102. Among other things, the Inspector requested that Respondents cover the exposed dirt piles during the evenings with plastic and straw, and Respondents complied with that request.

III. Conclusions of Law

A. Alleged Violation of 21 DCMR 543.3

The Government has charged Respondents with a violation of 21 DCMR 543.3. That regulation provides:

Projects which do not meet the criteria for minor projects or which include razing activities shall be classified and processed as a Major Project. An erosion and sedimentation control plan shall be required for all major projects.

In light of the scope of the project at the Work Site, it is properly construed as a Major Project. *See* 21 DCMR 543.1 (“Minor Project” defined as less than fifty square feet of earth disturbed, or total construction costs less than \$2,500). As such, § 543.3 requires that the project have an erosion and sediment control plan. *See DOH v. Washington General Contractors*, OAH No. I-00-10387 at 7-8 (Final Order, July 11, 2001).

Despite the Government’s contention to the contrary, the document submitted as PX 103 constitutes an adequate erosion and sediment control plan insofar as it was expressly reviewed

² Respondents have not been charged herein with a failure to obtain a building permit pursuant to 21 DCMR 502.1.

and approved as such by the Government prior to a building permit being issued for the Work Site.³ PX 103; 21 DCMR 502.1 (providing that the approval of a building permit shall be conditioned upon the submission of an erosion and sediment control plan which has been reviewed and approved by the Government); 21 DCMR 503.2 (providing authority for Government to disapprove an erosion and sedimentation control plan if it is found to be inadequate). Accordingly, this charge shall be dismissed.

B. Alleged Violation of 21 DCMR 539.4

The Government has also charged Respondents with a violation of 21 DCMR 539.4. That regulation provides:

Adequate erosion control measures shall be in place prior to and during the time of exposure.

Section 539.4 refers to “adequate erosion control measures.” This administrative court construes an adequate erosion control measure to be that which has been duly reviewed and approved by the Government as part of an erosion and sediment control plan. A silt fence was installed around the Work Site at the time of the Inspection as required by the plan submitted to and approved by the Government. PX 103. Moreover, according to the plan, there was no requirement that the dirt piles be controlled as was requested by the Inspector. *See* PX 103. Paragraphs 8 and 10 the Sediment Control Notes of the plan provide:

8. ALL DISTURBED AREAS WITHIN THE LIMIT OF DISTURBANCE
BOUNDARY NOT SHOWN TO BE PAVED SHALL BE SEEDED OR

³ I do not decide, however, whether an erosion and sediment control plan “detail” which has not been approved by the Government as an erosion and sediment control plan constitutes an erosion and sediment control plan for purposes of the Title 21, Chapter 5.

SODDED AS PER DC SPECIFICATIONS WITHIN SEVEN DAYS OF DISTURBANCE.

10. ANY STOCKPILING, REGARDLESS OF LOCATION ON SITE SHALL BE STABILIZED WITHIN 14 DAYS AND COVERED WITH PLASTIC OR CANVAS, AFTER ITS ESTABLISHMENT AND FOR THE DURATION OF THE PROJECT.

In this case, Respondents offered uncontroverted testimony that the dirt piles were established on the Work Site for no more than four days, and that the dirt from those piles was used to buttress the retaining wall. As such, no seeding or other covering was required under the plan. Moreover, to the extent the Inspector requested that additional controls be put in place, arguably pursuant to Paragraph 1 of the Sediment Control Notes, there is uncontroverted evidence in the record that Respondents promptly complied with that request, placing plastic and straw on the dirt piles during the evenings. Accordingly, this charge shall be dismissed.

C. Alleged Violation of 21 DCMR 539.9

The Government has also charged Respondents with a violation of 21 DCMR 539.9. That regulations provides:

All cut and fill slopes will be protected against stormwater run-off by use of diversions, which will be paved or otherwise protected by vegetation or matting from erodible velocities or volumes. On cut and fill slopes of equal or greater inclination than three horizontal to one vertical (3:1), critical area stabilization methods will be applied. Slopes flatter than 3:1 may require the application of critical area stabilization depending on soil characteristics.

There is no evidence in the record that Respondents utilized any diversions relating to the construction of the retaining wall at the Work Site. PX 100; *see also* PX 103 (providing guidelines for diversion of runoff). Accordingly, Respondents are liable for violating 21 DCMR 539.9 on September 11, 2001. A fine of \$100 is authorized for a first violation of this regulation, and I shall impose that fine. 16 DCMR 3234.2(bb).

D. Alleged Violation of 21 DCMR 541.2

The Government has also charged Respondents with a violation of 21 DCMR 541.2. That regulations provides:

All excavated material is to be placed on the uphill side of trenches.

As noted previously, I cannot conclude on this record by a preponderance of the evidence that Respondents failed to store excavated materials on the uphill side of the trench at the Work Site on September 11, 2001. As the Government bears the burden of proof in this regard, D.C. Official Code § 2-1802.03(a), this charge shall be dismissed.

E. Alleged Violation of 21 DCMR 505.3

Finally, the Government has charged Respondents with a violation of 21 DCMR 505.3. That regulations provides:

The permittee shall be responsible for notifying the Department within two (2) weeks after completion that the land disturbing activity has been completed.

This regulation expressly provides that it is the “permittee” that is obligated to notify the Government upon the completion of land disturbing activity. The Government has not provided evidence, however, as to which, if any, of the three Respondents named herein is the “permittee.” Moreover, the Notice of Infraction specified that the alleged violation of § 505.3 occurred on September 11, 2001, upon which date, as established by Government’s own photographic evidence, the land disturbing activity clearly had not been completed. *Compare* PX 100 *with* RX 200 *and* RX 202. Accordingly, this charge shall be dismissed.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, it is, hereby, this _____ day of _____, 2003:

ORDERED, that Notice of Infraction No. 00-10694 is hereby **DISMISSED WITHOUT PREJUDICE** as against Respondent Steve Chapman, only; and it is further

ORDERED, that Respondents Fine Earth Landscape, Inc. and Joel C. Hafner are **NOT LIABLE** for violating 21 DCMR 543.3 as charged in Notice of Infraction 00-10694; and it is further

ORDERED, that Respondents Fine Earth Landscape, Inc. and Joel C. Hafner are **NOT LIABLE** for violating 21 DCMR 539.4 as charged in Notice of Infraction 00-10694; and it is further

ORDERED, that Respondents Fine Earth Landscape, Inc. and Joel C. Hafner are **NOT LIABLE** for violating 21 DCMR 539.9 as charged in Notice of Infraction 00-10694; and it is further

ORDERED, that Respondents Fine Earth Landscape, Inc. and Joel C. Hafner are **NOT LIABLE** for violating 21 DCMR 541.2 as charged in Notice of Infraction 00-10694; and it is further

ORDERED, that Respondents Fine Earth Landscape, Inc. and Joel C. Hafner are **NOT LIABLE** for violating 21 DCMR 505.3 as charged in Notice of Infraction 00-10694; and it is further

ORDERED, that Respondents Fine Earth Landscape, Inc. and Joel C. Hafner, who are jointly and severally liable, shall pay a fine in the total amount of **ONE HUNDRED DOLLARS (\$100)** in accordance with the attached instructions within 20 calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½% per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondents pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

/f/ 01/08/03

Mark D. Poindexter
Administrative Judge